United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 21, 2010

TO : Alvin P. Blyer, Regional Director
Region 29

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Affiliated Computer Services, Inc.
Case 29-CA-30013

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by filing a petition for "pre-action disclosure" for permission to depose a union organizer in anticipation of filing a defamation lawsuit under New York state law. We conclude that the principles of BE & K Construction[1] should govern the Employer' petition and, applying those principles, we cannot say that the Employer lacked a reasonable basis for filing the petition.

The Employer's action occurs against the backdrop of a recent union organizing campaign. Although the Union won an election on June 26, 2009, the Employer filed objections and its Request for Review of the Regional Director's Report on Objections is currently pending before the Board. In addition, the Region has issued a consolidated complaint against the Employer alleging various violations of Section 8(a)(5) stemming from, among other things, the Employer's unilateral implementation of a new compensation system. The new system is designed to pay employees based on the quality of their work and output rather than an hourly rate.

On August 7, 2009, [2] the Employer filed in New York Supreme Court a Petition for Pre-Action Disclosure pursuant to New York Civil Practice Law and Rules (CPLR) Section 3102(c).[3] The Employer was seeking court permission to depose a Union organizer about what he told employees and third parties about the Employer. The Employer alleged that it believed the Union organizer had made false statements about the Employer, and it claimed it was looking for information necessary to sue the organizer for

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[1] BE & K Construction Co., 351 NLRB 451 (2007).

[2] All dates are in 2009.

[3] CPLR Section 3102(c) provides:
Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.

defamation, as well as information leading to other potential defendants.

In support of its petition, the Employer attached an affirmation of its Vice President of Operations. Among other things, she stated that after the election, the Union began contacting the Employer's employees, clients, and customers in "an apparent attempt to interfere with" the Employer's business and employee relations. She also claimed that "she was informed" that the Union organizer had told one of the clients that "employees wanted to take a militant approach in opposition to" the Employer's implementation of the new compensation plan, and that the Employer planned to lower wages and make it more difficult for employees to pay their mortgages and rents. She also claimed that the Union organizer had threatened that client that he would contact the client's customers concerning these matters. Finally, the Vice President of Operations claimed that the President of the International Union had written that same customer, reminding it of the "harmony clause" in its contract with the Employer that allowed it to terminate the contract in the event of a labor controversy.

The Union filed an opposition to the Employer's petition, submitted its own evidence, appeared in court to argue on behalf of the organizers, and submitted a brief in support of its opposition.

On October 7, 2009, the court dismissed the Employer's petition. Relying on state law, the court held that the Employer was required to demonstrate a prima facie case for defamation to obtain leave for pre-action discovery under CPLR 3102(c). It further concluded that, under New York state law, "only upon a showing of actual malice may a plaintiff have a prima facie case of defamation against a labor union." Finding that "nothing in the contents of [the Union's alleged] statements suggest that they were false or that [the Union} has a reckless disregard for their falsity," the Employer had failed to demonstrate a prima facie case.

ACTION

We conclude that the principles of BE & K Construction should govern the Employer's petition for pre-action disclosure and, applying those principles, we cannot say that the Employer lacked a reasonable basis for filing the petition.

In Bill Johnson's, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: 1) lacks a

reasonable basis in law or fact; and 2) was commenced with a retaliatory motive.[4] In BE & K, the Board clarified that there are no circumstances in which a reasonably based lawsuit could be an unfair labor practice, regardless of the motive for initiating the lawsuit. A lawsuit cannot be deemed objectively baseless unless its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits."[5]

First, we conclude that the standards articulated in the Board's decision in BE & K apply to resolve whether the Employer violated the Act by filing the petition for pre-action disclosure. In BE & K, the Board was concerned with protecting the "First Amendment right of access to the courts."[6] The Employer's right of access to the courts is clearly at issue here as it was seeking the court's permission to engage in pre-action discovery.

Second, based on the current evidence, we cannot say that the Employer's petition was "objectively baseless." The Employer argued that its petition for pre-action discovery was necessary to identify potential defendants who might have made defamatory statements, frame a complaint, and preserve any potential evidence. Although the judge found that the Employer failed to satisfy the minimal requirement of stating a prima facie case, without further pressing the Employer for evidence or argument that it could fulfill that requirement, we cannot say that "no reasonable litigant could reasonably expect to succeed."

Accordingly, because we cannot say that the Employer lacked a reasonable basis for filing the petition, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[4] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 748-749 (1983).

[5] 351 NLRB at 457.

[6] Ibid.